BEFORE THE NEVADA STATE BOARD OF OSTEOPATHIC MEDICINE

IN THE MATTER OF THE COMPLAINT AGAINST

JAMES DANIEL CARPENTER, D.O.,
LICENSE NO. 926

) CASE NO. PB-04-17-926
) FILED:

Executive Director

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER

This matter came on for hearing, before Lisa Miller-Roche, Acting Chair for this hearing, and members of the Nevada State Board of Osteopathic Medicine ("Board"), noticed in accordance with Nevada's Open Meeting laws and NRS and NAC Chapters 633. The investigating member of the Board, Dr. Gary Mono, was represented by Charlotte Bible, Chief Deputy Attorney General, and Ruth Cain, Deputy Attorney General. Respondent, James Daniel Carpenter, D.O. ("Dr. Carpenter"), was represented by Melody Porter, Esq. The Hearing in this matter was held on February 25, 2005; February 28, 2005; February 27, 2005; April 15, 2005; April 16, 2005; April 17, 2005; May 24, 2005; July 27, 2005; and July 30, 2005. Closing arguments on the parties' post-hearings briefs were scheduled for September 17, 2005, at which time the Board deliberated and entered a decision. The Board's written findings, conclusions of law, and order, as well as a discussion of the testimony and evidence presented, are set forth as follow:

DISCUSSION OF FACTS/CASE

This case began with a complaint filed by the Board on or about July 13, 2004, after patients and two physicians filed allegations against Dr. Carpenter with the Board (State Exhibits 4 and 6). The two physicians testified they had never previously filed a complaint against a fellow physician. (Transcript of hearing (hereafter "Tr."), p. 37 and
The complaint contained 28 counts regarding Dr. Carpenter's care and treatment of ten (10) ophthalmology patients; i.e., 13 counts of malpractice, 1 count of gross malpractice, and 14 counts of unprofessional conduct.

Dr. Carpenter was licensed by the Board in 1999. He testified that he came to Nevada to open his practice as a sole physician directly out of residency training. (Tr., p. 1094-95.) He has denied the allegations raised, and the matters alleged in the complaint came on for hearing by the Board.

Re: Count I -- Maurice Butler

Counts I and II of the subject complaint pertain to Maurice Butler. Dr. Eisenberg and Dr. Cassidy testified on behalf of the state concerning the inadequate records; and Dr. Maw and Dr. Carpenter offered counter-testimony regarding these allegations. More specifically, Count I pertained to inadequate medical records or the lack of records which would be a violation of NRS 633.131(f) and NAC 633.350(5) and grounds for disciplinary action, as it constitutes malpractice. Dr. Carpenter’s medical records, for example, reflect a stick figure for certain eye tests, which stick figure is not a type of record typically maintained by an ophthalmologist. Another example of inadequate records, as alleged by the Investigating Board member, would be the circles with marks located thereon reflecting a gonioscopy was performed and its results. Both Board Members Curtis and McMahon felt that Dr. Carpenter’s medical records were “sloppy” but in Dr. Carpenter’s own way, the records were reflective of the procedures performed.

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1 Malpractice is defined in NRS 633.071 as a “failure on the part of an osteopathic physician to exercise the degree of care, diligence and skill ordinarily exercised by osteopathic physicians in good standing in the community in which he practices.”

2 This was a common allegation by the State in its complaint against Dr. Carpenter, as well as “sloppy” record keeping; and such is a problem in light of the fact that various physicians testified that such was not the normal medical charting and did not recognize such charting. One member during deliberations even suggested that Dr. Carpenter receive additional training in the proper techniques of medical charting.
Finding: The complaint was brought against Dr. Carpenter due to his unrecognized medical charting (stick figure) and the lack of information contained therein (whether dilation was performed on the patient).

Finding: Because of the competing experts' testimony regarding the medical records, the Board found in favor of Dr. Carpenter on Count I.

Re: Count II - Maurice Butler

Count II pertains to a YAG posterior capsulotomy performed on Mr. Butler's right eye allegedly without sufficient history, diagnosis, treatment plan, and even a documented need for such a procedure as the patient's chief complaint was for glaucoma. The Investigating Board Member alleged that such conduct constitutes gross malpractice. It was alleged that the cataract surgery was unnecessary for this individual due to the condition of his eye. The same physicians who testified regarding Count I also testified regarding this Count. More specifically, Dr. Eisenberg testified that Butler did not receive a complete and thorough examination (Tr. p. 194) and there was no need noted in the record indicating the capsulotomy was necessary (Tr. p. 203). Dr. Cassidy testified similarly. (Tr. p. 495.) Dr. Eisenberg also testified that Butler's primary reason for seeking treatment was glaucoma (Tr. p. 59). Six months prior to the cataract surgery, Dr. Thatcher (Butler's physician at that time) diagnosed his vision as "NLP," no light perception, i.e., Butler was blind. JE 2.3.

Finding: Dr. Maw's answers were less credible in some instances such as with this Count II. He repeated the question, slowly and deliberately, as if to determine the less offensive way to answer the questions posed; whereas Dr. Eisenberg appeared as a very knowledgeable, credible witness with respect to this Count, and testified that Dr. Carpenter was simply over his head in some instances, and the treatment rendered fell
below the standard of care.

Finding: The Investigating Board Member has offered substantial evidence to support the allegations raised in Count II; and thus, the Board finds against Dr. Carpenter on Count II.

Counts III, IV, V, and VI pertain to Ms. Vivian Cabellero. Ms. Cabellero was a patient who filed a complaint with the Board against Dr. Carpenter. She saw Dr. Carpenter due to injuries arising from an auto accident. She believed she was charged excessively for the treatment rendered. Drs. Cassidy, Carpenter, and Maw testified regarding this patient and her treatment.

Re: Count III -- Vivian Cabellero

Count III pertained to various treatments allegedly rendered but not warranted, and/or not performed. The Investigating Member alleged such is unprofessional conduct pursuant to NRS 633.131(c) and is, therefore, grounds for discipline. Dr. Carpenter did not investigate Ms. Cabellero's complaints of headaches and blurred vision, as Dr. Carpenter's records contain no documentation of such (Tr. p. 424; JE 287-88). Dr. Cassidy indicated that such an investigation is important with motor vehicle accident patients complaining of these symptoms. (Tr. p. 424.) During deliberations on this Count, Board Member McMahon described Dr. Carpenter's medical practice as being a "process" whereby patients are seen by a number of individuals who performed a number of tests whether or not they were warranted.

Finding: The Board finds that the State was successful in bringing forth evidence to substantiate the facts raised in Count III as to patient Cabellero; and as such, finds unprofessional conduct on the part of Dr. Carpenter with respect to this patient.
Re: Count IV - Vivian Cabellero

Count IV pertained to punctual plugs being inserted without the patient’s full consent and permission as well as inadequate medical records. Furthermore, credible testimony was offered that plugs are not the first choice of treatment for dry eyes. (Tr. p. 420, JE 394.) Dr. Cassidy also testified that the plugs were not medically necessary (Tr. p. 420-21). See also State Exhibit 4 and JE 311. The Investigating Board Member alleges that acts by Dr. Carpenter failed to meet that degree of care, skill and diligence ordinarily exercised by osteopathic physicians in this community and that such constitutes malpractice pursuant to NRS 633.071 and/or gross or repeated malpractice which are grounds for disciplinary action pursuant to NRS 633.511(4).

Finding: The Board finds that the State was successful in bringing forth evidence to substantiate the facts raised in Count IV as to patient Cabellero; and as such, finds unprofessional conduct on the part of Dr. Carpenter with respect to this patient.

Re: Counts V and VI - Vivian Cabellero

Count V pertained to Ms. Cabellero being billed for procedures and tests not supported by notes with medical records. Count VI pertained to “unbundling charges.” An example of “unbundling” is paying for individual food items rather than one price for an entire buffet. Testimony was offered that the Culinary Union did not renew its contract with Dr. Carpenter; however, testimony was also offered that other physicians were dismissed by that Union as well.

Although Dr. Cassidy testified that he had never seen a gonioscopy noted in records as Dr. Carpenter did, Dr. Maw testified that Dr. Carpenter noted the results of the test in his own way in the medical records.

Finding: State did not prove its case with respect to Counts V and VI based on
conflicting testimony of expert witnesses.

**Re: Counts VII and VIII -- Leo Hamel**

Counts VII and VIII pertained to Leo Hamel, who complained of "red eye" or conjunctivitis. The State complained that not all tests performed were warranted and that the medical records were inadequate and or below the standards for the medical community. Drs. Carpenter, Cassidy and Lawrence all testified, in their opinions, whether the tests were necessary. Dr. Carpenter stated that Blue Cross Insurance Company didn't pay entire bill; and testimony was offered that the treatment was reasonable.

**Finding:** Based on the testimony of competing expert witnesses and Dr. Carpenter's own method of charting, the State failed to offer substantial proof to support these Counts VII and VIII.

**Re: Counts IX through XII -- Mary Kirchoffer**

Counts IX through XII pertained to Mary Kirchoffer and the improper insertion of punctual plugs, billing for services not performed, and lack of adequate records. Ms. Kirchoffer filed a complaint with the Board concerning the care and treatment rendered to her by Dr. Carpenter. Drs. Cassidy, Maw, Carpenter, and Lawrence testified concerning Kirchoffer's care and treatment; and each had their own competing opinions concerning the allegations. Testimony was offered that Ms. Kirchoffer sought a new prescription for eye glasses from Dr. Carpenter; however, a battery of tests and procedures were performed that were unnecessary. Ms. Kirchoffer, for example, was filled for an OCB biometry which is not part of a routine examination and is a test only performed prior to cataract surgery. (Tr. of 7-27-05, p. 17, p. 361 and 376.) Other alleged unnecessary tests included but were not limited to sensorimotor examination,
extended ophthalmoscopy, and gonioscopy.

Testimony was offered that it is less expensive to utilize plugs than eye drops. Dr. Carpenter did admit that it may not be the standard to perform a gonioscopy in every case; however, he believes it is good medicine. The alleged inadequate records include stick figures as a representation of tests results and the circles for the gonioscopy.

The State alleged that Dr. Carpenter failed to exercise the degree of skill, care, and diligence ordinarily exercised by osteopathic physicians and that he committed and/or engaged in malpractice (NRS 633.071), unprofessional conduct (NRS 633.131(1)(c)), and/or unethical conduct that constitutes unfitness to practice medicine; and such are grounds for discipline.

Finding: Count IX pertained to the patient desiring a routine eye exam for glasses and, instead, received a battery of unnecessary tests and procedures. The State offered substantial proof to support the facts raised in Count IX; and the Board finds against Dr. Carpenter.

Finding: Counts X and XI pertained to results of tests and/or procedures not being documented in medical records, i.e., gonioscopy and sensorimotor examinations, and/or the inadequacy of medical records. Although mentioned above, Dr. Carpenter’s charts and medical records are not in the standard form or style physicians are accustomed to, they do reflect his method of charting. Therefore, the State failed to prove these allegations in light of testimony offered at the administrative hearing in this matter.

Finding: Count XII pertains to the patient being billed for services not rendered. Although the charting is not in the customary fashion, the Board finds the procedures and/or testing were performed and properly billed to the client. The State, therefore,
failed to meet their burden in proving this Count.

Re: Counts XIII through XVI -- Carol Lepczyński

Counts XIII through XVI pertained to Carol Lepczyński. This patient was seen by Dr. Carpenter for a blowout fracture of the left eye due to a fall or blow. The State alleged that Dr. Carpenter failed to keep adequate records including but not limited to the fact that the operative notes do not mention sutures being required, yet, later office notes do mention suture replacement and wound revisions. (Counts XIII and XIV.) In addition to the failure to create adequate and accurate records, the State alleges that the medical records contain false, inaccurate, and conflicting information (Count XV); and that Dr. Carpenter’s treatment, including follow up care, of this patient fell below the standard of care, skill, and diligence required (Count XVI). The State alleged that Dr. Carpenter committed and/or engaged in malpractice (NRS 633.071) and unethical conduct constituting unprofessional conduct (NAC 633.350(3) and (5)).

Drs. Shalev, Cassidy, Carpenter, and Lawrence testified regarding the medical treatment rendered to this patient. More specifically, Dr. Shalev testified that this patient was simply not a good candidate for cataract surgery. In his opinion, based upon the mental capability of this patient, he stated that she would simply do whatever she was told to do without any independent judgment or second-guessing. Dr. Shalev filed a complaint with the Board concerning this patient, as he believed the treatment was unwarranted and exhibits a lack of good medical judgment on the part of Dr. Carpenter since the patient already had an eye which turned out. He testified that the surgery should never have been performed in the first place and that such is gross malpractice, and grounds for discipline.

Dr. Carpenter testified that he omitted certain information from the medical
records rather than "branding" the patient with certain accusations, e.g., hurting herself
due to demons in her head. He did admit that the operative report contained mistakes
and/or omissions when compared with subsequent documentation.

Finding: The Board unanimously finds the testimony of Dr. Shalev as very
credible and compelling concerning Count XIII; and further finds that the State offered
substantial evidence in support of this Count, thus, finding against Dr. Carpenter.

Finding: Count XIV pertains to inadequate medical records. As testified above,
although some may disagree with the quality of Dr. Carpenter's medical records, they
are nonetheless medical records. Based thereupon, the Board finds that the State did
not meet its burden with respect to this count.

Finding: Count XV pertains to the inaccuracies in Dr. Carpenter's medical records
concerning the sutures and wound revision. Based upon Dr. Carpenter's own
admissions concerning the discrepancies in the record as well as other testimony offered
herein, the Board finds that the State has met its burden of proof and finds against Dr.
Carpenter on the charge of unprofessional conduct.

Finding: Count XVI pertained to the follow up care; and the Board unanimously
finds Dr. Shalev's testimony compelling and that the State has met its burden of proof
concerning the facts raised in this Count, finding against Dr. Carpenter.

Re: Counts XVII through XIX - - Richard Truman

Counts XVII through XIX pertain to Richard Truman. Mr. Truman had end-stage
glaucoma and underwent an Express Mini Shunt to his left eye. Pressure remained
uncontrolled and he was referred to a retina specialist (Dr. Kirmani) rather than to a
glaucoma specialist like Dr. Eisenberg. When the patient was finally seen by Dr.
Eisenberg, it was determined that the mini shunt was plugged with iris material. The
State further alleged that postoperative care was ineffective and inadequate. See Count XVII. In Count XVIII, the State alleged that Dr. Carpenter did not have adequate training for this procedure based on the fact that Mr. Truman was experiencing end-stage glaucoma and pressure remained uncontrolled. Count XIX alleged inadequate medical records, e.g., no operative report.

Dr. Eisenberg, Dr. Cassidy, Dr. Kirmani, Mr. Truman, Dr. Lawrence, and Dr. Carpenter testified as to the care and treatment rendered to this patient. Mr. Truman admitted during the hearing that Dr. Carpenter did warn him that the shunt may not be effective. Dr. Carpenter testified that it is not unusual for patients to try any procedure in an attempt to save what eye sight they may have. Dr. Eisenberg admitted during the hearing that the mini shunt procedure was initially marketed as appropriate for individuals such as Mr. Truman. (Transcript 7:30-05, p. 65, l. 11-16.) Yet, Dr. Eisenberg testified that the mini shunt was plugged with iris tissue. Eventually, Mr. Truman lost sight in the one eye. Based on the care rendered, the State alleged Dr. Carpenter committed malpractice and/or engaged in unethical conduct concerning this patient.

Finding: Based upon Dr. Eisenberg's comments concerning the initial marketing of mini shunts, the Board finds that the State did not meet its burden of proof with respect to Count XVII.

Finding: Although Mr. Truman was first referred to a retina specialist and that specialist referred him to a glaucoma specialist, no harm was documented or proven by the State; and based then upon, the State failed to meet its burden of proof with respect to Count XVIII.

Finding: Count XIX pertained to a missing operative report concerning a wound revision performed on March 28, 2003; and the Board finds a report is located at JE 170-
71. Had Dr. Carpenter maintained better records, the Board further finds that a
complaint alleging lack of records would not have been necessary.

Re: Count XX -- Lawrence Raskin; Count XXI -- Robin Raskin

Counts XX and XXI pertain to Lawrence and Robin Raskin. These patients saw
Dr. Carpenter for eye glasses and filed a complaint with the Board concerning the
treatment rendered, e.g., errors in the prescriptions. The State alleged that tests were
performed that were not required for a new eyeglass prescription, e.g., gonioscopy.

Drs. Cassidy, Carpenter, and Maw testified regarding these patients as well as
Linda Zeigler. See pgs. 358 and State Exhibit 11, concerning the different prescriptions.

Concerning Mrs. Raskin, Dr. Carpenter's billing codes reflected treatment
rendered for cancerous cysts but the medical records do not support a diagnosis of
cancer. See Exhibit 371, it is indicated that the cyst is on the right side, yet records
indicate it was on the left. The State alleges that Dr. Carpenter committed and/or
engaged in malpractice.

Finding: Treatment of these two patients confirm the "processing" of patients
seen in Dr. Carpenter's office with the performance of tests and procedures when they
may not be medically warranted or necessary for all cases. Based thereon, the Board
finds that the State has met its burden of proof on both Counts XX and XXI for
unprofessional conduct, but not malpractice as charged.

Re: Counts XXII and XXIII -- Rene Collier

Counts XXII and XXIII pertain to Rene Collier. More specifically, Ms. Collier had
multiple serious injuries/she was chronically ill. Dr. Carpenter scheduled cataract surgery
without ever contacting her treating physicians. The surgery was performed on March
13, 2001 and Dr. Carpenter did not see her again until March 18, 2001, which the State
alleged is below the standard of care for follow-up treatment after surgery. Furthermore, the eye was allegedly inflamed. Dr. Carpenter claimed he had removed virtually all fragments; yet Dr. Kirmani removed large fragments of crystalline lens in the posterior area of the eye and extensive lenticular debris, as well as noticed a large retinal tear. Such records appear contradictory.

Drs. Pizio, Shalev, Kirmani, Carpenter, and Maw testified regarding this patient's care and treatment. Dr. Pizio claimed a large amount of debris in a patient's eye can cause permanent damage and the patient should have been referred to a specialist immediately. The patient is now legally blind. Dr. Shalev testified similarly; however, Drs. Kirmani, Carpenter, and Maw all testified the treatment was appropriate. The State had alleged that Dr. Carpenter committed malpractice with respect to the medical care rendered to this patient.

**Finding:** The Board finds that the State carried its burden of proof with respect to Count XXII in that Dr. Carpenter failed to generate or create medical records relating to the diagnosis, treatment, and care provided to a patient; and such failure is a failure to exercise that degree of care, diligence, and skill ordinarily exercised by an osteopathic physicians in this community. Dr. Carpenter should have contacted the patient's treating physicians prior to performing surgery.

**Finding:** Dr. Kirmani testified credibly that Dr. Carpenter's post-operative care of this patient was appropriate and within the standard of care; for example, his prescribing of anti-inflammatories, monitoring her, and ultimately referring her to a specialist (Dr. Kirmani). Based on such testimony, the Board finds that Count XXIII is not supported by the evidence.
Re: Counts XXIV through XXVI - - Margarita Fleites

Counts XXIV, XXV, and XXVI pertain to Margarita Fleites. Count XXIV pertains to Dr. Carpenter's performing cataract surgery without a retinal consultation inasmuch as she had significant diabetic retinopathy (JE-69-80) and his failure to perform a thorough preoperative examination. The State has alleged that this is malpractice. Dr. Pizio testified that Ms. Fleites suffered considerable damage to her eye and cornea as a result of the cataract surgery (transcript, p. 77-78).

Counts XXV and XVI pertained to Dr. Carpenter not personally seeing the patient after the surgery, and the State claims such is malpractice by Dr. Carpenter. Testimony was offered by Dena Pyle that she took the patient to Dr. Carpenter’s office, waited over three hours, and was forced to leave without the patient seeing Dr. Carpenter. Office sign-in sheets were offered as exhibits during the hearing and Ms. Fleites’ name does not appear therein. Testimony by Dr. Jorgenson, the Director of Ms. Fleites’ nursing home, was that he saw her for Dr. Carpenter and reported to him of her condition.

In addition to Ms. Pyle and Dr. Jorgenson, Drs. Maw, Kirmami, Pizio, and Carpenter, testified regarding the care and treatment of this patient. On one medical record in Ms. Fleites’ charts, the patient is identified as “M. Flores” (p. 82).

Finding: The Board finds that Dr. Carpenter’s failure to seek a retina specialist (Count XXIV) was reasonable based on the testimony of Dr. Carpenter’s experts witnesses and further finds that the State did not meet its burden of proof to sustain this count.

Finding: As to Count XXV, the State carried its burden that Dr. Carpenter failed to follow up with this patient.

Finding: Count XXVI contains the allegations that Dr. Carpenter abandoned this
patient and that such action is unethical and unprofessional. The Board finds that this
would be the harshest allegation against a physician if proven, but could not find that the
State met its burden of proof on this charge in light of Dr. Jorgenson seeing the patient
on behalf of Dr. Carpenter and Dr. Jorgenson’s testimony that Ms. Fleites no longer
wished to be treated by Dr. Carpenter.

Re: Count XXVII

In Count XXVII, the State alleges Dr. Carpenter engaged in gross malpractice
pursuant to NRS 633.511(4), by performing medical procedures and rendering medical
services or treatment which were not appropriate and/or unnecessary, yet patients were
billed for the same. Dr. Carpenter alleged that the testimony of Drs. Pizio and Eisenberg
were biased as they are his competitors. Ben Gaitor, a patient of Dr. Carpenter, testified
favorably for Dr. Carpenter.

During deliberations on this Count, the Board noted that it must look at the totality
of the situation in deciding this count. Board member McMahon noted that Dr. Carpenter
is probably liked by his patients and that he generally renders good care to his patients,
but he has established a “process” of certain tests and procedures, whether warranted or
not, by which he handles his patients’ workload. This “process,” as described in the care
of Mr. and Mrs. Raskin, has removed Dr. Carpenter from his patients’ care and
treatment. This is evidenced by the various, numerous styles of writing in the record.

Board Member Curtis voiced his opinion that Dr. Carpenter is too aggressive in
the testing and procedures rendered to patients and this results in an increased
billing/revenue for Dr. Carpenter. Board member Curtis offered the motto of “leave no
patient uncharged.” He further opined that the State has proven unnecessary tests were
performed, such as the sensorimotor test is not required for every patient. The practice
of osteopathic medicine must be tailored to the patients and the patients' needs.

With such warnings being emphasized by the Board, it unanimously agreed that Dr. Carpenter's license should not be revoked.

Finding: Although the State was successful in bringing forth certain counts in the complaint, the acts do not rise to a level that Dr. Carpenter's license should be revoked; however, the Board does find unprofessional conduct by Dr. Carpenter and a lesser form of discipline is warranted.

Re: Count XXVIII

Count XXVIII pertained to Dr. Carpenter's documentation containing the designation of "M.D." rather than "D.O." Testimony was offered that the corporate documents contained errors committed by the attorney for Dr. Carpenter and that Dr. Carpenter did not misrepresent himself for improper purposes. However, other documents, such as medical records, merely contain the designation of "Dr."

Finding: The State failed to meet its burden of proof that the mistaken designation was intentional and/or was unprofessional conduct for which discipline is warranted.

Finding: The Board finds that the State had sufficient grounds for bringing the instant complaint against Dr. Carpenter based on the complaints lodged with the Board by several patients and physicians.

FINDINGS OF FACT

For the sake of organization and a more coherent understanding of the facts of the case, the charges alleged, and the Board's findings, such were set forth above with specificity and will not be repeated herein.

However, should any finding of fact mentioned herein be more properly construed as a conclusion of law, may it be so deemed.
CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matters of the Complaint on file herein pursuant to the provisions of NRS and NAC Chapters 633.

2. Dr. Carpenter is a licensed Osteopathic physician subject to the provisions of NRS and NAC Chapters 633.

3. The Board is mandated to license and monitor Osteopathic physicians in this State to protect the public health and safety, and to protect the general welfare of the people of this state. NRS 633.151.

4. Pursuant to NRS 633.641(1), proof of actual injury to a patient is not required for proof of unprofessional conduct.

5. Pursuant to NRS 633.651 and NAC 633.470(2), this Board has authority to issue various forms of discipline for violations of NRS and NAC Chapters 633.

6. Malpractice is defined in NRS 633.071 as a "failure on the part of an osteopathic physician to exercise the degree of care, diligence and skill ordinarily exercised by osteopathic physicians in good standing in the community in which he practices."

7. Gross malpractice is defined in NRS 633.041 as "malpractice where the failure to exercise requisite degree of care, diligence or skill consists of... (2) Gross negligence; (3) Willful disregard of established medical procedures; or (4) Willful and consistent use of medical procedures, services or treatment considered by osteopathic physicians in the community to be inappropriate or unnecessary in the cases where used."

8. Unprofessional conduct is defined in NRS 633.131 and includes, but is not limited to: "Willfully making a false or fraudulent statement." "Failure of a licensee to designate his school of practice in the professional use of his name by the term D.O., osteopathic physician, doctor of osteopathy or similar term," engaging in "Professional conduct which is intended to deceive or which the Board by regulation has determined is
unethical or medical practice harmful to the public or any conduct detrimental to the public health, safety or morals which does not constitute gross or repeated malpractice or professional incompetence," obtaining compensation for "any professional services not actually and personally rendered," and willful disobedience of the regulations of this Board.

9. Unethical conduct is defined in NAC 633.350 and includes, but is not limited to, the abandonment of a patient, willfully making and filing false reports or claims, willfully failing to file a record a medical record, failure to generate or create medical records concerning the care of a patient, failure to comply with an order of this Board, and engages in conduct which the Board determines to be an unfitness to practice osteopathic medicine.

10. NRS 633.511 identifies the grounds upon which disciplinary action may be taken and such includes, but is not limited to, unprofessional conduct, gross or repeated malpractice, professional incompetence.

11. NRS 633.651 provides in pertinent part that if the Board finds the person guilty as charged in the formal complaint, it shall by order take one or more of the following actions: place the physician on probation for a specific period or until further order of the Board, administer a public reprimand, limit the physician's practice, suspend the license for a specific period of time or until further order of the Board, or revoke the physician's license. This statute further allows the Board to order "such other terms, provisions or conditions as the Board deems proper and which are not inconsistent with law."

12. NAC 633.470 provides further guidance to the Board on the issue of discipline after a hearing has been conducted and the physician has been found guilty of the charges alleged in the complaint against him. Such guidance includes the Board's right to consider mitigating factors, or as Member McMahon offered, the Board should look at the totality of the matters. This regulation also allows the Board to recover all
costs incurred relating to the disciplinary proceedings.

13. The Board concludes, based upon the testimony and evidence offered, that
the State and the Board's Investigating Board Member sustained the allegations raised
in Counts II, III, IV, IX, XIII, XV, XVI, XX, XXI, XXII, XXV, and XXVII. These Counts
pertain to patients Butler, Cabellero, Kirchoffer, Lepczynski, Lawrence and Robin
Raskin, Rene Collier, Margarita Fleites, and the count alleging repeated acts of
unprofessional conduct. More specifically:

(a) The Board concludes that Dr. Maw's testimony was less credible than
Dr. Eisenberg's testimony; and that the YAG posterior capsulotomy was performed
without adequate history, diagnosis, treatment plan, and need. See Count II.

(b) The Board concludes that certain treatment rendered to Ms. Cabellero
was not warranted and/or performed. See Count III.

(c) The Board concludes that punctual plugs were inserted without patient
Cabellero's full consent and permission. See Count IV.

(d) The Board concludes that patient Kirchoffer received a number of
unnecessary tests and procedures. See Count IX.

(e) The Board concludes that the records maintained by Dr. Carpenter on
patient Lepczynski were inadequate and lacking. See Count XIII.

(f) The Board concludes that Dr. Carpenter failed to maintain accurate
medical records on patient Lepczynski. See count XV.

(g) The Board concludes that Dr. Carpenter's care and follow up care of
patient Lepczynski fell below the standard of care, skill and diligence required of an
Osteopathic physician. See Count XVI.

(h) The Board concludes that Dr. Carpenter's care and treatment of
Lawrence Raskin included the performance of unnecessary tests. See Count XX.

(i) The Board concludes that Dr. Carpenter's care and treatment of Robin
Raskin included the performance of unnecessary tests. See Count XXI.
(j) The Board concludes that Dr. Carpenter's medical records pertaining to Ms. Collier were inadequate and/or incomplete. See Count XXV.

(l) The Board concludes that Dr. Carpenter performed medical tests and/or procedures which were not appropriate or necessary; and performing such tests and procedures would financial benefit Dr. Carpenter. See Count XXVII.

(m) The Board concludes, based upon the totality of the facts as offered through witnesses' testimony and exhibits, the acts mentioned in this Conclusion of Law #13 constitutes unprofessional conduct.

14. The Board concludes the State and the Investigating Board Member have established the facts alleged in their successful Counts, but based upon various mitigating factors, that Dr. Carpenter has engaged in unprofessional conduct rather than malpractice or gross malpractice; and based upon Dr. Carpenter's repeated acts of unprofessional conduct with eight (8) patients, discipline is warranted.

15. The Board concludes that the acts complained of do not at this time rise to the level of malpractice or gross malpractice, as noted above, and based upon the fact that this is the first time Dr. Carpenter has been brought before the Board on charges.

16. The Investigating Board Member properly brought this complaint before the Board based upon the complained filed by patients and two respected physicians in this community.

17. The Board concludes that the State is entitled to fees and costs incurred in prosecuting this disciplinary matter.

18. If any conclusion of law mentioned herein be more properly construed as a finding of fact, may it be so deemed.

**DECISION AND ORDER**

Based upon the testimony and exhibits offered, and pursuant to NRS and NAC Chapters 633, the Board orders as follows:
Based upon the testimony offered and exhibits/evidence admitted, the Board hereby orders as follows:

(1) Dr. Carpenter was found to have engaged in unethical conduct and unprofessional conduct in violation of NRS and NAC Chapters 633 and should be disciplined.

(2) Dr. Carpenter is hereby placed on probation for a period of two (2) years. During that two-year probation period there shall be four (4) random audits per year of Dr. Carpenter's practice. Dr. Gary Mono and Dr. Carpenter shall agree as to the physician being the auditor and if the parties are unable to agree on an auditor within thirty (30) days, this Board will select one at the next scheduled meeting. The auditor shall review five to ten (5-10) random patients' charts for review as to the adequacy of the records, the reasonableness of tests or procedures performed, and Dr. Carpenter's billing procedures. The auditor is to provide written reports to the Board concerning the audits performed. Dr. Carpenter shall bear the costs of all audits. Furthermore, the auditor shall be a qualified ophthalmologist.

(3) The State is hereby awarded fees and costs incurred in bringing this administrative action. The State shall file a memorandum of costs and disbursements within twenty (20) days from written notice of the entry of this order. Respondent Carpenter shall have ten (10) days thereafter to oppose the memorandum and the State shall have five (5) days thereafter to file reply points and authorities in support of the request for fees and costs.
(4) Failure to comply with any terms or conditions of this order and the order on the fees and costs, will be considered unethical conduct as well as unprofessional conduct and will result in this matter being returned to the Board for further disciplinary action.

DATED THIS 26th day of October, 2005.

LISA MILLER-ROCHE, Acting Chair Person